damages. *Passinger* v. *Thorburn*, 34 N. Y. 634. But these are suffered only in comparatively few instances; the hardship of the rule is no greater on the dealer than on the manufacturer, who is presumably not negligent; and the dealer has his remedy over against his vendor on the latter's implied warranty. For these reasons it is believed that the modification of the doctrine of *caveat emptor* by the Sale of Goods Act, by which all sellers impliedly warrant the merchantability of goods sold, is worthy of legislative imitation as the just and more politic rule.

PROVOCATION IN MITIGATION OF DAMAGES. — Evidence of provocation is admitted everywhere in mitigation of punitive damages. *Kiff* v. *Youmans*, 86 N. Y. 324; *Ward* v. *Blackwood*, 41 Ark. 295. Obviously the more a defendant acts under provocation, the less is he deserving of punishment. Furthermore, to give a plaintiff a fine made necessary partly by his own conduct would place a premium upon inciting the commission of torts.

The mitigation of compensatory damages on account of provocation, however, presents a question upon which the decisions are in confusion. Many courts refuse altogether to allow such mitigation, holding that to do so would be to violate the well established principles that mere words cannot justify an assault, and that one who has been injured by another without legal justification can recover for the loss which he has suffered. *Goldsmith* v. *Joy*, 61 Vt. 488; *Fenelon* v. *Butts*, 53 Wis. 344. Of those courts which allow the mitigation of compensatory damages, some do so for the same reason for which they allow the mitigation of punitive damages, overlooking the distinction that punitive damages are exacted only by way of punishment, while compensatory damages are given merely to recompense for actual loss. *Fraser* v. *Berkeley*, 7 C. & P. 621. Others adopt a ground which may be best described as a sort of "moral set-off," the defendant being allowed to balance his ethical claims against the legal claims of the plaintiff. *Burke* v. *Melvin*, 45 Conn. 243. In still others it has been vaguely suggested that the doctrine of punitive damages should be mutual, that it should apply to the conduct of the plaintiff as well as to that of the defendant. *Robison* v. *Rupert*, 23 Pa. St. 523.

This last suggestion would seem to embody the correct principle. Through punitive damages the community punishes the defendant by making him pay more than is necessary to compensate the plaintiff; through mitigation of damages it punishes the plaintiff by giving him less than will compensate him for the loss which he has suffered. In both cases a penalty is placed upon the wrongdoer primarily to punish him, and this is given to the other party only incidentally for reasons of convenience. See SEDG. DAM. 8th ed. § 352 f. On this ground it is believed that a recent New York case which extends the doctrine of *Kiff* v. *Youmans*, *supra*, to the mitigation of compensatory damages was correctly decided. It carries out consistently the New York attitude as to punitive damages. *Genung* v. *Baldwin*, 77 N. Y. App. Div. 584. Since mitigation of damages is only punitive damages in another form, the above reasoning does not apply to states in which the doctrine of punitive damages is repudiated. There the arguments that criminal and tort liability should not be confused, and that an action fitted for securing compensation for private injury is not adapted to punishing public wrong, would be applied equally to both forms of punitive damages. *Mangold* v. *Oft*, 88 N. W. Rep. 507 (Neb.).

It should be noted, that wholly apart from any question as to mitigation of damages, evidence as to provocation is always material in determining the extent of the actual injuries to the plaintiff's feelings. *Prentiss* v. *Shaw*, 56 Me. 427; *Parker* v. *Coture*, 63 Vt. 155. This is well recognized in the cases of libel and slander, where injury to the feelings causes the larger part of the compensatory damages. *B*—— v. *I*——, 22 Wis. 372. On the same principle, evidence of malice on the part of the defendant is admitted in aggravation of damages for injury to the feelings. *Hawes* v. *Knowles*, 114 Mass. 518.

THE NEW YORK FRANCHISE TAX. — In an anxiously awaited decision the New York Court of Appeals, reversing the judgment of the Appellate Division, has sustained the Special Franchise Tax Act, Laws of 1899, c. 712. *People, ex rel. Metropolitan St. Ry. Co.*, v. *State Board of Tax Commissioners*, 174 N. Y. —, (decided April 28, 1903). This statute authorizes the assessment of franchises to operate in "streets, highways, or public places," together with the tangible property used in such places, by the State Board of Tax Commissioners. The franchises and tangible property thus valued are to be subject, as realty, to the regular municipal, county, and state taxes. It was contended by the franchise owners that the assessment by a state board violated the "home rule" provision of the New York Constitution which directs that municipal officers for whose selection the Constitution does not otherwise provide shall be chosen by the electors of the municipality.

In the absence of an express constitutional guarantee of the right of local self-government, the cases are squarely in conflict upon the question of the existence of the right as an unwritten limitation upon the power of the legislature. The right was recognized in *People* v. *Hurlbut*, 24 Mich. 44; *contra*, *State* v. *Williams*, 68 Conn. 131. But whether the right depends upon express constitutional provision or not, its existence being once recognized, the cases are agreed as to its extent. See 1 DILL. MUN. CORP. 4th ed. § 58 a. The test of the state's power to control municipalities is, broadly speaking, whether the function in question is exercised by the city in its capacity as agent of the state, or in its capacity as agent of its own people, — whether, in short, the function is of general or of merely local interest. *Allison* v. *Welde*, 172 N. Y. 421; see 15 HARV. L. REV. 848. The application of the test, however, is not always easy.

The reasons assigned for considering the assessment of franchises a matter best dealt with by the state seem adequate. In the first place, in order to secure even an approximation to uniformity throughout the state in the assessment of property of such uncertain value, it is necessary that but one system should be employed. Again, since many companies operate in more than one municipality, state assessment avoids the evils of piecemeal valuation. And finally, control over structures in a highway would seem to follow from the recognized right of the legislature to control the highways themselves. *People* v. *Flagg*, 46 N. Y. 401. As to the tangible property in the highways, valuation can best be made only in connection with the franchises. The decision relied upon by the Appellate Division would seem not to control. *People* v. *Raymond*, 37 N. Y. 428. In that case a statute transferring all the functions of municipal tax commissioners to a state board was held unconstitutional. As some features of taxation are clearly of local importance only, that statute, in so far as it affected them, appears rightly to